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No. 937

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Appellant,

vs.

JAMES WILLIAM WIERNICK,

Appellee.

On Appeal From The United States District Court For The Northern District of Illinois

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BRIEF FOR THE APPELLEE IN OPPOSITION

RAYMOND J. SMITH
105 West Adams Street
Chicago, Illinois 60603
Attorney for
James William Wiernick

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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OPINION BELOW

The opinion of the District Court dismissing the two counts of the indictment on September 9, 1969 is not reported.

JURISDICTION

Jurisdiction of this court rests on 18 U.S.C. 371.

QUESTIONS PRESENTED

1. Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of violating 18 U.S.C. 1403 (a) (1) by using the mails to make a transfer of marijuana not pursuant to a written order form in violation of 26 U.S.C. 4742 (a).

2. Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of shipping marijuana interstate in violation of 26 U.S.C. 4755 (b).

STATUTES INVOLVED

26 U.S.C. 4755 (b) provides in pertinent part:

> (b) Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marijuana * * * from any State * * * into any other State * * *. Nothing contained in this subsection shall apply—
>
> (1) to any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive.
>
> * * * * *

18 U.S.C. 1403 (a) (1) provides in pertinent part:

> (a) Whoever uses any communication facility [including the mails] in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy the penalty for which is provided in—
>
> (1) subsection (a) or (b) of 7237 of the Internal Revenue Code of 1954,[1]
>
> * * * * *
>
> shall be imprisoned not less than two and not more than five years * * *

---

[1] Insofar as pertinent here subsection (b) of Section 7237 prescribes the penalty for transferring marijuana not pursuant to a written order form of the transferee.

STATEMENT

Appellee was charged in a two-count indictment in the United States District Court for the Northern District of Illinois with violating statutes relating to the shipment and transportation of marijuana. Count 1 charged that on or about April 7 and 8, 1969, he shipped by way of the United States mail approximately 953 grams of marijuana from California into Illinois, in violation of 26 U.S.C. 4755 (b). Count 2 charged that on these same dates, appellee violated 18 U.S.C. 1403 (a)(1) by using a communications facility, the United States mail, in the commission of an offense under 26 U.S.C. 4742 (a), *viz.*, transferring this marijuana not pursuant to a written order of the transferee.

On appellee's motion, the district court dismissed both counts of the indictment on the ground that appellee's privilege against self-incrimination would provide a complete defense to the prosecution.

ARGUMENT

1. The appellant's argument as to Count II of the indictment is that the appellee's privilege against self-incrimination does not provide a complete defense to a charge of violation of 18 U.S.C. 1403 (a)(1) since the substance of this offense is sale or transfer of marijuana and not possession. Since the filing of the petition of the United States, the court has held, in *Buie* v. *United States*, ... U.S....., 6 CrL 3014 that a seller or transferor does not have a complete defense to a charge under 26 U.S.C. 4742 (a) as does a transferee or possessor on a violation of 26 U.S.C. 4744 (a)(2) under *Leary* v. *United States*, 395 U.S. 6, 89 S.Ct. 1532.

However, the indictment here did not charge the appellee with a violation of 26 U.S.C. 4742 as being a transferor or seller of marijuana, but charged the respondent with the use of the mails in violation of 18 U.S.C. 4301 (a)(1).

The gravamen of the offense under Section 1403 (a)(1) is the use of the mails. Therefore, the possession of marijuana coupled with use of the mail are the essential elements of the offense. The elements of this offense under Section 1403 (a)(1) are therefore akin to the offense of a violation under 26 U.S.C. 4744 (a), the offense involved in *Leary*. In *Leary* the petitioner was a possessor or transferee of marijuana, although also charged with having transported, concealed, and facilitated the transportation and concealment of marijuana.

Another indication that Section 1403 (a)(1) is directed to the possessor and not the seller of marijuana is the difference in the punishment under Section 1403 (a)(1) and

Section 4742 (a). Section 1403 (a)(1) provides the punishment of imprisonment not less than two (2) years nor more than five (5) years, while the punishment under Section 4742 (a) is not less than five (5) years nor more than twenty (20) years imprisonment.

Therefore, the appellee is entitled to the assertion of the privilege against self-incrimination as a complete defense to the charge of violating 18 U.S.C. Section 1403 (a)(1).

2. The substance of the argument of the appellant under Count I of the indictment is that an illicit possessor of marijuana is not permitted by law to register and pay the occupational tax imposed under 26 U.S.C. Sections 4751 - 4753 and that therefore the possessor is in no way to be compelled to incriminate himself by attempting to comply with these provisions. It is true that in *Leary* v. *United States*, 395 U.S. 6, 89, S.Ct. 1532 at 1541 n. 38 the court stated "there is strong support in legislative history for the proposition that illicit consumers of marijuana like petitioner [Leary] are not entitled to register" under Sections 4751 - 4753. However, this Court in *Leary* held at 1537 that the petitioner [Leary] exposed himself to "real and appreciable risk of self-incrimination" since "Sections 4741 - 4742 required him, in the course, of obtaining an order form to identify himself not only as a transferee of marijuana *but as a transferee who had not registered and paid the occupational tax under Sections 4751 - 4753*".

The appellee here according to the terms of 26 U.S.C. Sections 4755, like the petitioner in *Leary* also exposed himself to a "real and appreciable risk of self-incrimination" as a transferee who had not registered and paid the occupational tax under Sections 4751 - 4753. Attempted compliance with provisions of Sections 4755 (b) would have also incriminated the respondent under Sections 4741-4742 under the holding of *Leary*.

CONCLUSION

The order of the District Court dismissing counts 1 and 2 of the indictment should be affirmed.

RAYMOND J. SMITH,
Attorney for Appellee

January 1970.